FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Citizenship v SZNAV [2009] FCAFC 109

MIGRATION – protection visa – review by Refugee Review Tribunal – whether letter sent by Refugee Review Tribunal information for the purposes of s 424(2) of the *Migration Act 1958* (Cth) – whether procedures set out in s 424B of *Migration Act* applied

Held: appeal allowed

Migration Act 1958 (Cth), ss 424, 424B
Migration Regulations 1994 (Cth), regs 4.35, 4.36

Minister for Immigration and Citizenship v SZKTI & Anor [2009] HCA 30 followed
Minister for Immigration and Citizenship v SZLFX & Anor [2009] HCA 31 followed

MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZNAV, SZNAW, SZNAX, SZNAY and REFUGEE REVIEW TRIBUNAL
NSD 826 of 2009

STONE, JACOBSON & JAGOT JJ
27 AUGUST 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 826 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
Appellant

AND: **SZNAV**
First Respondent

SZNAW
Second Respondent

SZNAX
Third Respondent

SZNAY
Fourth Respondent

REFUGEE REVIEW TRIBUNAL
Fifth Respondent

JUDGES: **STONE, JACOBSON & JAGOT JJ**
DATE OF ORDER: **27 AUGUST 2009**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The respondents are to pay the appellant's costs of the appeal and the proceeding below, as agreed or as taxed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZNAV** **First Respondent**
	SZNAW **Second Respondent**
	SZNAX **Third Respondent**
	SZNAY **Fourth Respondent**
	REFUGEE REVIEW TRIBUNAL **Fifth Respondent**
JUDGES:	**STONE, JACOBSON & JAGOT JJ**
DATE:	**27 AUGUST 2009**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a decision of the Federal Magistrates Court delivered on 23 July 2009; *SZNAV & Ors v Minister for Immigration and Anor* [2009] FMCA 693. The Federal Magistrate upheld an application for review of a decision of the Refugee Review Tribunal, dated 22 October 2008 thereby quashing the Tribunal's decision to affirm a decision of a delegate of the appellant not to grant Protection (Class XA) Visas to the first, second, third and fourth respondents.

2 The respondents are citizens of Bangladesh. The first and second respondents are a married couple; the third and fourth respondents are their children. The first respondent based his claim to a protection visa on his having a well-founded fear of persecution by reason of his religious beliefs. The second, third and fourth respondents made no independent claims and were dependent on the success of the first respondent's claims. The fifth respondent has filed a submitting appearance and henceforth a reference to the respondents in these reasons does not include the fifth respondent unless specifically indicated.

3 The factual allegations underlying the first respondent's claims centred on his marriage. The first respondent is a Hindu; his wife, the second respondent, was a Muslim but converted to Hinduism at the time of their marriage. They claimed to have suffered persecution because of their marriage and the second respondent's conversion. The Tribunal did not accept these claims, holding that the first respondent was not a credible witness and that it was not satisfied that he had a well-founded fear of persecution in Bangladesh. The Tribunal therefore refused the respondents' applications for protection visas.

Review in the Federal Magistrates Court

4 The respondents applied for review of the Tribunal's decision in the Federal Magistrates Court. The Federal Magistrate did not find any jurisdictional error in those parts of the Tribunal's reasons discussed above. However, his Honour did uphold the respondents' ground of review that the Tribunal had breached s 424B(2) of the *Migration Act 1958* (Cth). The Minister's appeal relates to that issue. The respondents have not challenged the Federal Magistrate's decision in relation to the other grounds of review. In this appeal it is therefore unnecessary to consider further these aspects of the Tribunal's reasons or of the Federal Magistrate's reasons in respect of them.

5 The relevant ground of review in the Federal Magistrates Court concerned a letter (the acknowledgment letter) dated 17 July 2008 signed by a Tribunal Officer and sent to the respondents' migration agent as the authorised recipient. The acknowledgment letter bears the handwritten notation, "Posted 17/7/08" with the initials "D.O." which are the initials of the Tribunal Officer who signed the letter. It would appear from this notation that the acknowledgment letter was sent on the day it was written. The letter, which is set out in full

in the reasons of the Federal Magistrate at [20], acknowledges receipt of the application for review on 16 July 2008 and says, "This letter explains what we will do next and what we expect you to do". It contains information about the review process in the form of questions that might be asked by an applicant for review and answers by the Tribunal. The questions include, "What will the Tribunal do now?", "Will I be invited to a hearing of the Tribunal?", "What is a hearing and why is it important?" and "What does the Tribunal expect me to do?" The answer to the last question is as follows:

> You should:
> - tell us immediately if you change your contact details (such as your home address, your mailing address, your telephone number, your fax number or your email address) or if there is any change in the contact details of your authorised recipient. If you do not, you might not receive an invitation to a hearing or other important information and your case may be decided without further notice. We have enclosed forms to use when advising us of changes to your contact details. (You should also inform the Department of any change in these details)
> - use your RRT file number when you contact us. Your number is: xxxxxxx
> - immediately send us any documents, information or other evidence you want the Tribunal to consider. Any documents not in English should be translated by a qualified translator.

6 Before the Federal Magistrate the respondents submitted that the letter was an invitation to them to provide additional information and therefore enlivened s 424(2) of the Act. Consequently, it was submitted, it was necessary for the letter to comply with the requirements for written invitations set out in s 424B. The latter section states, inter alia, that the response to such an invitation is "to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period".

7 Regulation 4.35 of the *Migration Regulations 1994* (Cth) imposes a 14 day period in respect of information to be provided from Australia (reg 4.35(3)) and 28 days where the information is to be provided from outside Australia (reg 4.35(4)). In this case, it was submitted, the acknowledgment letter did not provide for the prescribed period because it specified that the additional information was to be provided "immediately". The Federal Magistrate accepted this characterisation of the letter and stated at [32]:

> … I am of the view that the appropriate description of the acknowledgement letter is that it is a letter written pursuant to s 424 to which the provisions of s 424B(2) apply and that by requiring the information "*immediately*" the writer did not require it to be given within the prescribed period. This caused a breach of s 424B(2).

8 The Federal Magistrate held that the failure to specify the prescribed period was a jurisdictional error. His Honour acknowledged that the Court has a discretion not to grant relief in the case of jurisdictional error if, in the particular circumstances, the applicant has suffered no injustice. His Honour noted at [45], however, that the Minister had made no submissions upon discretion and that "It is not for this Court to undertake that task for him". His Honour therefore ordered that the decision of the Tribunal be quashed and a writ of mandamus be directed to Tribunal requiring it to reconsider and determine the matter according to law.

This appeal

9 The Notice of Appeal filed in this Court sets out 10 grounds of appeal. The respondents submitted that none of the issues referred to in the 10 grounds of appeal was raised by the Minister in the Federal Magistrates Court but acknowledged that the matters were in issue before the Federal Magistrate. This acknowledgment was proper. Grounds 1 to 4, in one form or another, all take issue with the Federal Magistrate's characterisation of the acknowledgment letter as an invitation under s 424(2) of the Act and with his conclusion that s 424B applied. The matters were thus raised in the proceeding below, even if not raised by the Minister.

10 Grounds 5 to 10 of the Notice of Appeal, in the alternative, claim that even if the letter is found to be an invitation pursuant to s 424(2) and to have infringed s 424B(2), the judgment should be set aside on other grounds, including that there was no unfairness to the respondents, that the breach was not a jurisdictional error and that the Court should have exercised its discretion to refuse relief.

11 For reasons given below we have concluded that the appeal should be allowed on the basis of grounds 1 to 4. Consequently it is not necessary to consider the alternative grounds advanced by the Minister.

12 The hearing of this appeal confronted the respondents with a difficult task. This is because, to a large extent, the issues have been overtaken (and simplified) by the decisions of the High Court in *Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30 and *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31. These decisions were

handed down on 26 August 2009, the day before the hearing of this appeal. The High Court overruled the Full Federal Court's decisions in *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256; [2008] FCAFC 83 and *Minister for Immigration and Citizenship v SZLFX* [2008] FCAFC 125. By implication *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236; [2008] FCAFC 119 was also overruled. The High Court's decisions in *SZKTI* and *SZLFX* fundamentally shift the ground about s 424 on which the respondents' arguments essentially depended.

13 In the words of the High Court, at [8] in *SZKTI*:

> The central issue in this appeal, which is also the central issue in *SZLFX*, is whether the RRT may telephone a person, for the purpose of obtaining information from that person, without following the procedures set out in ss 424(3) and 424B, having regard to s 441A of the Act which is incorporated by reference into s 424(3) … The issue of whether the RRT was required to "get any information" by an invitation in writing, turns essentially upon the construction of the relevant statutory provisions.

14 The telephone call in question in *SZKTI* was made by the Tribunal to Mr Tony Cheah, a member of the visa applicant's local church group. The visa applicant had given the Tribunal a letter from Mr Cheah confirming the visa applicant's attendance at the church. The letter volunteered that the Tribunal should not hesitate to contact Mr Cheah should there be any further enquiries. Mr Cheah provided his mobile telephone number and, some time later, the Tribunal telephoned him. The Full Federal Court held that the Tribunal was obliged to comply with ss 424(2) and (3) in obtaining information from Mr Cheah in this way.

15 The High Court's conclusions in *SZKTI* concerning the Tribunal's power to obtain information are conveniently to be found in its summary of the Minister's submissions which the High Court accepted. Noting that the Tribunal's review process is inquisitorial the High Court said at [27]-[28]:

> [**27**] …In that context the Minister submitted that there were three powers by which the RRT could obtain information, with a descending order of consequences for any refusal to respond: first, by compulsory process (s 427(3)), a breach of which constitutes an offence; secondly, by formal invitation (s 424(2)), where a failure to respond to the invitation allows the party to proceed to make a decision on the review without giving a hearing (ss 424C(1) and 425(2)(c)); and thirdly, by an informal process seeking voluntary answers, where no potential adverse consequences to the applicant for review are engaged. Section 424(1) was construed by the Minister as a general facultative power in aid of the inquisitorial functions of the RRT distinguishable from both the compulsory process under the Act and the formal statutory process which could result in the loss of a right to a hearing.

> [**28**] By way of comparison, the Minister construed s 424(2) as a special or particular method (other than compulsory process) by which the RRT can obtain additional information. Failure by the applicant to respond to an invitation under s 424(2) carries the consequence that the RRT may make a decision on the review without inviting the applicant for review to appear at a hearing (ss 424C(1) and 425(2)(c)). The applicant in those circumstances is not entitled to a hearing (425(3)). That consequence distinguished this method of obtaining information from the general informal power to get information under s 424(1). Refusal to provide information under s 424(1) carries no adverse consequences for the applicant in respect of the right to a hearing under s 425. … **For the reasons which follow, the submissions of the Minister should be accepted** …
>
> [Emphasis added]

16 The High Court explicitly rejected the submission made by the first respondent in *SZKTI*, to the effect that power given by s 424(2) is a subset of the general power in s 424(1). First, the Court noted (at [33]) that the Act, by s 415(1), vests the Tribunal with all of the powers and discretions of the primary decision-maker, including that decision-maker's power to request information. The High Court said at [33]:

> Under s 415(1), the RRT is given all the powers and discretions that are conferred by the Act on the person who made the decision. These include the power to get information which is thought to be relevant (s 56(1)) and the power to invite an applicant to give additional information (s 56(2)). An invitation to provide information can be to provide it over the telephone (s 58(1)(e)) and the procedures in s 58 do not prevent the Minister from obtaining information from an applicant by telephone or in any other way (s 59(2)). The powers given under s 56 work simultaneously with the powers given under s 424, although there is no constraint similar to that found in s 424(2) because under s 56(2) the Minister may "orally or in writing" invite an applicant "to give additional information".

17 The High Court also pointed to the different consequences for the applicant for review that would follow from ss 424(1) and (2) if the applicant (or another person) failed to cooperate or to give the information sought and observed at [45]-[46]:

> [**45**] The first respondent's submission turns on the proposition that s 424(1) and (2) cover the same powers, that s 424(2) is encompassed within, or is a subset of, the general power in s 424(1). There is a difficulty with that submission. Section 424(1) puts into statutory form a power to obtain information by asking questions. This is an obvious power to give to an inquisitorial body. Subject to not interfering with the liberty of another, making an enquiry with no power to compel an answer is not an unlawful activity. No adverse consequences flow against the applicant for review if the applicant, or any other person questioned, fails to co-operate or to give the information sought. By comparison, the specific power in s 424(2) governed by ss 424(3) and 424B, to give an invitation in writing to provide additional information, results in the adverse consequence that an applicant who fails to respond to an invitation in writing is deprived of the entitlement to a hearing. These critical distinctions emphasise the fact that the powers in ss 424(1) and 424(2) are, in law, significantly dissimilar.

> [**46**] The general power to "get" information and the specific power to "invite" in writing the giving of additional information are capable of co-existing without the latter being repugnant to the former. Further, an oral request for information would be authorised not only by s 424(1) of the Act but also by s 56(1), by reason of the operation of s 415 which has been explained above.

18 In concluding its analysis of s 424, the High Court said at [48]:

> Given all the considerations described above, the phrase "[w]ithout limiting subsection (1)", as it occurs in s 424(2), means that the procedural restrictions on the specific power to issue an invitation to give additional information do not qualify the RRT's general power in s424(1) to "get any information that it considers relevant".

19 Accordingly the High Court held that the Tribunal's oral request for information made in its telephone call to Mr Cheah did not involve a breach of either of ss 424(3) or 424B.

20 Counsel for the respondents attempted to confine the reasoning in *SZKTI* in various ways. Hence, it was submitted for the respondents that the Tribunal's power to seek information still had to be found in s 424 and that this Court still had to ask itself whether the acknowledgment letter involved the Tribunal in getting information it considered relevant in accordance with s 424(1) or inviting a person to give additional information in accordance with s 424(2) (and, in this regard, we note that subsequent amendments to s 424 are immaterial to the resolution of this appeal). Valiant though this attempt was, it cannot succeed in the face of the reasoning in *SZKTI*.

21 In short, we accept the submissions of the Minister's counsel. Following the decision in *SZKTI*, it cannot be said that s 424 is the only source of the Tribunal's power to obtain information. It has that power by dint of s 415(1) and the powers of the primary decision-maker in s 56 which the Tribunal thereby attracts. Further, the difference between ss 424(1) and 424(2) is to be found in the consequences of non-compliance, and not the making of fine distinctions between the Tribunal getting relevant information and inviting a person to give additional information. Section 424(1) is facultative. Failure to comply with such a request has no consequence adverse to the applicant for review. Section 424(2) is a formal request. It must be given in a particular manner (s 424(3)) and satisfy certain requirements (s 424B). Failure to comply with such a formal invitation has adverse consequences. The Tribunal may make a decision on the review without inviting the applicant for review to appear at a hearing (ss 424C(1) and 425(2)(c)).

22 In the present case, no adverse consequences flowed to the respondents. They were not deprived of a hearing. Hence, and as the Minister's counsel submitted, the only possible questions that arise in a context where jurisdictional error is required in order to vitiate the Tribunal's decision are whether the Tribunal had power to say what it did in the acknowledgment letter (which it did, ss 415(1) and 424(1)) and whether the exercise of that power contravened any provision of the Act (which it did not, as there was no question of the Tribunal proceeding to make a decision on the respondents' application if they did not provide any "documents, information or other evidence" in response to that letter). Accordingly, the appeal must be allowed.

23 The respondents' counsel made further submissions which, given our conclusions above, it is not necessary to consider. We do so nevertheless, albeit briefly. We do not accept that the acknowledgment letter, in the words of s 424(2) at the relevant time, was an invitation to a person to give additional information. According to this submission the acknowledgment letter is in the "optative mood" and thus expresses a wish or a request. We prefer a different interpretation of the language used. The relevant part of the acknowledgment letter, construed in context, is nothing more than advice to the respondents about how to ensure that their application is complete. This does not involve any permission to the Tribunal to avoid its obligations under ss 424(3) and 424B. Given the reasoning in *SZKTI*, the language of avoidance is inapt.

24 Decisions such as *MZXRE v Minister for Immigration and Citizenship* [2009] FCAFC 82 and *SZLPO v Minister for Immigration and Citizenship* (2009) 255 ALR 407; [2009] FCAFC 51 do not assist the respondents. They were decided before *SZKTI*. *SZKTI*, as the Minister submitted, determines the outcome of this appeal.

25 We would also be disposed to find that the appeal should be allowed on the ground that the acknowledgment letter did not fall within s 424(1) because it was not the Tribunal (as constituted under s 421 by the Principal Member to review the respondents' application) "getting" information in the conduct of the review. Rather it was an administrative exercise preliminary to the review. Its purpose was to provide the respondents with information about the review process and advise them of their rights. In our view it was analogous to a Court registry writing to a party to a proceeding prior to a hearing. Such a letter would, of course,

come from the Court but would not involve an exercise of judicial power or be part of the conduct of proceedings before the Court. This approach is consistent with the reasoning in *SZKTI*. In that context, the exercise of power involved in sending the acknowledgment letter was purely administrative, engaging the powers attracted to the Tribunal by s 415(1). The provisions of the Act with respect to the constitution of the Tribunal (Div 9 of Pt 7) and of the Regulations about the powers of officers of the Tribunal (reg 4.36) do not support a contrary view. As discussed, the power in s 424(1) is expressed to be one "in conducting the review". This is different from the exercise of administrative power in connection with the review as referred to in reg 4.36.

26 For these reasons the appeal must be allowed with costs.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Stone, Jacobson and Jagot.

Associate:

Dated: 28 August 2009

Counsel for the Appellant:	Mr R Beech-Jones SC and Mr J A C Potts
Solicitor for the Appellant:	Clayton Utz
Counsel for the Respondents:	Ms A Arunothanyam
Solicitor for the Respondents:	Fragomen
Date of Hearing:	27 August 2009
Date of Judgment:	27 August 2009